MALAYAN UNITED FINANCE BHD.

v.

WAN MUDA WAN ISMAIL & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[CIVIL SUIT NO. 982 OF 1985]
4 MAY 1992

CIVIL *PROCEDURE:* *Setting aside judgment in default - Standard of proof required - Whether prima facie case sufficient - Whether signature on guarantee forged - Section 73 of the Evidence Act 1950.*

This was an appeal by the plaintiffs against the decision of the Senior Assistant Registrar in allowing the judgment in default against the 3rd defendant to be set aside and granting unconditional leave to defend.

The plaintiffs' claim against the 3rd defendant is for a sum of RM31,387.12 arising from a claim under a deed of guarantee purported to be signed by the 3rd defendant. The 3rd defendant raised two points, namely that he was not served with the writ of summons and that the signature on the deed of guarantee is not his.

The plaintiffs in support of that claim produced a sworn affidavit of one Stephen Liew stating that he witnessed the 3rd defendant's signature on the guarantee, at the time it was executed by the 3rd defendant.

The 3rd defendant exhibited pertinent documents for comparison of his signatures to that as contained in the guarantee.

Held:
[1] As the 3rd defendant had made out sufficient evidence that he had a *prima facie* defence the plaintiffs' appeal was dismissed with costs.

[Plaintiffs' appeal dismissed with costs.]

Legislation referred to:
Evidence Act 1950, s. 73

For the appellant/plaintiff - Badrulhisam Hussain; M/s. Leng & Co.
For the respondent/defendant - Philip Nainan; M/s. Philip Nainan & Co.

JUDGMENT

James Foong J:

This is an appeal by the plaintiffs against the decision of the Senior Assistant Registrar granted on 23 October 1991 allowing the judgment in default against the 3rd defendant dated 10 August 1987 to be set aside and granting unconditional leave to defend with no order as to costs.

The plaintiffs' claim against the 3rd defendant is for a sum of RM31,387.12 with interest and costs arising from a claim under a deed of guarantee purported to be signed by the 3rd defendant.

Besides the reasons explaining that he was not served with the writ of summons, the 3rd defendant also alleged that he has a good defence. This is based on the fact that the signature on the deed of guarantee is not his and that it is a forgery. It is on this ground alone that is the issue of contention before this Court.

The plaintiffs submitted that a mere allegation of such nature by the 3rd defendant is not sufficient. This is particularly so when, one Stephen Liew has sworn an affidavit in support of the plaintiffs' claim stating that, he witnessed the 3rd defendant's signature on the deed of guarantee at the time it was executed by the 3rd defendant.

Various authorities were cited by the plaintiffs relating to the law governing the setting aside of a default judgment. I am in full agreement with these authorities which, in short, require the basic rule that the 3rd defendant must adduce certain amount of evidence to show that he has a *prima facie* case.

After careful perusal of the affidavit of the 3rd defendant (encl. 34A) I come to the finding that the 3rd defendant has made out sufficient evidence that he has a *prima facie* defence. The 3rd defendant did not merely allege that he did not execute on the deed of guarantee but, also exhibited pertinent documents for comparison of his signatures to that as contained in the guarantee. The 3rd defendant proceeded even further to explain and counter the allegations of Stephen Liew as to how his name and signature could have come about in the guarantee.

The plaintiffs' Counsel vigorously argued that what is adduced by the 3rd defendant in his affidavit is insufficient, as allegation of forgery being a serious matter should have further and more conclusive proof. I find no merits in this submission for reason that at this stage of the proceedings the standard of proof that is required of the 3rd defendant is that of proving a *prima facie* case. This is not a trial of the substantive matter where the parties can adduce their respective witnesses to prove a matter conclusively. As at this stage of trial, to demand a heavier burden of proof would defeat the very nature of such proceedings of setting aside a default judgment.

The affidavits of all parties at this stage cannot be conclusively accepted as the truth of what are alleged therein, except when the deponents are properly cross examined in accordance with the rules of the Court. To say that what Stephen Liew has affirmed is the truth at this stage would be premature. Similarly this applies equally to the 3rd defendant's affidavit. Therefore at this stage, the Court is only concerned with whether the 3rd defendant has adduced sufficient evidence of a *prima facie* case and, if he has, then the matter can go to trial for final determination.

In this case, as I have stated earlier, I find that on the allegations stated by the 3rd defendant, he has proved to my satisfaction that he has a *prima facie* case made out. The 3rd defendant did annex to his affidavit his passport, driving licence and an earlier hire purchase agreement which he had executed for comparison with his purported signature in the deed of guarantee. Under s. 73 of the Evidence Act, this Court is empowered to make such comparison. After such comparison, I do find that there are differences in the signatures contained in the deed of guarantee with that of the other documents. These documents so forwarded by the 3rd defendant for comparison are just not any documents but, documents which signature of the 3rd defendant would have been verified carefully under close scrutiny. Therefore, these documents are reasonable to be used for such comparisons. As I have stated earlier, there

are indeed other more conclusive proof to whether the signature on the deed of guarantee belongs to the 3rd defendant but, at this stage it is sufficient proof that there are differences for the purpose of qualifying a *prima facie* case.

I therefore dismissed the plaintiffs' appeal with costs. As the amount claimed falls far below the jurisdiction of this High Court, I hereby immediately order that this case be transferred to the subordinate Court for trial and that the 3rd defendant do file his defence therein within 14 days after notification that this case has been so transferred.

Also found at [1992] 4 CLJ 1868